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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL K. BROWN, Defendant and Appellant.	A100236 (Alameda County Super. Ct. No. 140852)

Following a jury trial, appellant Michael K. Brown was convicted of robbery (eight counts), attempted robbery (three counts), carjacking (two counts), and attempted escape from jail. In a separate proceeding, the court found true allegations relating to 12 prior felony convictions. The court sentenced appellant to a total term of 87 years to life under the Three Strikes Law. On appeal, appellant challenges his convictions for robbery, attempted robbery, and carjacking, on the following grounds: (1) the in-court identifications of him by the witnesses were unconstitutionally suggestive; and (2) the trial court abused its discretion in denying his request for funds to hire an expert on eyewitness identification. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Between September 15, 2000, and October 19, 2000, appellant committed a series of robberies, attempted robberies, and carjackings in Alameda County.[1] After a carjacking

[1] The factual and procedural background concerns counts one, two, three, four, six, seven, eight, nine, eleven, twelve, thirteen, and fourteen of the first amended indictment. Although appellant was found guilty of robbery under count 10, and attempting to escape

incident on October 19, 2000, appellant was identified at a show up and arrested. At the time of his arrest he was wearing a black, white, and blue plaid jacket or shirt, which was admitted at trial as People's Exhibit 7. On two occasions, the police interviewed appellant, once on October 19 and once on October 20. After appellant was advised of and waived his *Miranda* rights at each interview, he made admissions connecting him to seven of the ten incidents at issue. Some of appellant's statements were tape recorded and played for the jury during the trial; additionally, transcripts of the tapes were admitted at trial upon appellant's request.

On November 1, 2000, the police held two six-men physical lineups. Except for Agueda Perez, all the trial witnesses who had attended lineups attended the first one in which appellant was in position number four. Perez attended the second lineup in which appellant was in position number five. Each man in the lineups was asked to put on a baseball style hat and the jacket appellant was wearing when he was arrested (People's Exhibit 7). The men in the first lineup were asked to say the following phrases: "I'm going to jump over this counter; open the register, bitch; let me have your keys; put the keys in the ignition; stop crying; don't make me hurt you; and let me see the palms of your hand." The men in the second lineup were asked to say the following phrases: "Yeah, what she said; give me the money; and don't come around here." In April 2001, two witnesses were shown store surveillance videotapes of two of the robberies and still frame photographs taken from the videotapes.

Appellant was represented by assigned counsel at the lineups. However, during pretrial proceedings, on March 27, 2002, the superior court granted appellant's motion to represent himself and relieved his assigned counsel. Thereafter, appellant represented himself throughout the pretrial and trial proceedings.

At the jury trial held in June and July 2002, about 20 months after the incidents, the People presented the following evidence regarding each incident at issue:

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from jail under count 15, he does not seek reversal of those convictions or raise any issues that would impact upon those convictions.

A. September 15, 2000—Attempted Robbery and Robbery at Busch's Bakery in San Leandro (Counts 1 and 2)

At 6:30 a.m. on September 15, 2000, appellant entered Busch's Bakery in San Leandro; Gina Woolbert was at the front counter. Appellant told her to open the cash register. When Woolbert failed to comply, appellant jumped over the counter. Because she was too afraid to scream, Woolbert backed up into the baking area to alert the owner, Andrew Jatczak, that something was going on. Jatczak asked appellant what he wanted, and appellant demanded that Jatczak open the register. Appellant looked like he had a gun in his sweatshirt, but Jatczak did not actually see a weapon. Jatczak opened the register, and appellant took all of the money, covering his hands with the sleeves of his sweatshirt. When appellant asked for more money, Jatczak told him there was no more money and appellant left. In response to a question from a juror, Detective Doug Calcagno of the San Leandro Police Department testified there were no usable or lifted fingerprints found on the counter.

Woolbert did not identify anyone as the robber at the November 1, 2000, lineup and she was unable to identify anyone in the courtroom. At the November 1, 2000, lineup, Jatczak marked his lineup card with an X on "number four" (appellant's position) because he (Jatczak) was certain that was the person who robbed him. When the prosecutor asked Jatczak to look around the courtroom to see if the perpetrator was in the courtroom, Jatczak identified appellant. On cross-examination, Jatczak testified he could possibly identify appellant if he were not the only person sitting at the defense table or if he saw him on the street under regular circumstances; appellant had "the face" Jactzak remembered from the lineup.

Detective Doug Calcagno of the San Leandro Police Department testified appellant admitted some details corresponding to this robbery at Busch's Bakery.

B. October 8, 2000—Robbery at Sabino's Cafe in San Leandro (Count 3)

At about noon on October 8, 2000, appellant entered Sabino's Cafe in San Leandro, and handed a note to Agueda Perez. The note said to give appellant all the money or he would hurt her. When Perez hesitated, appellant said, "[d]o it or I'll hurt you." Perez gave

appellant all the paper money and some change from the register. Before he left, appellant took the robbery note.

Perez positively identified appellant in court, claiming she was 100 percent sure of her identification. However, after she viewed the November 1, 2000, lineup, Perez marked her lineup card with a question mark on "number five" (appellant's position). She had used a question mark "[b]ecause the suspect was wearing different color clothing the day of the robbery to the day of the lineup. The day of the robbery he also had a beanie which he was trying to kind of cover his eyes with that day. And the day of the lineup when he was asked to put on a hat, he kind of sat it on his head. So those just made it a little different." On cross-examination, Perez further explained her uncertainty at the lineup: "It was light clothing. As to the day of the robbery it was dark clothing. [¶] Also, we were asked if we wanted the suspects to say anything. It just seemed like this person faked their voice. As to when the day of the robbery, it was kind of low-keyed so that nobody else would hear. And the day of the lineup his tone of voice changed a lot. [¶] . . . [¶] . . . I knew this person was the person right away. I am not going to forget this face. But what threw it off a little, prompted me to mark a question mark and not an X, was the clothing and the way he spoke." When asked why she was able to identify appellant in court when he was wearing different clothes from the robber, Perez replied: "You look a little different now, but I mean your facial features don't change. Your eyes still look the same. Your nose, your lips, it's the same thing. [¶] The day of the lineup you did have a lot more facial hair, a beard I guess you can say, and the day of the robbery it wasn't like that. [¶] But I can look at you and, you know, see that now it's a goatee and it's not a beard and it's not the way you were the day of the robbery, but I still know that it was you." Perez would be able to pick appellant out if she saw him sitting in the audience with the jurors and not at the defense table because she looked "towards this way and that way when I was asked. I didn't look just over to that specific spot."

Detective Calcagno testified appellant admitted specific details corresponding to this robbery at Sabino's Cafe.

C. October 11, 2000—First Robbery at Toot Sweets Bakery in Berkeley (Count 4)

At about 10:15 a.m. on October 11, 2000, appellant approached Chelsey Gentry, who was behind the counter in Toot Sweets Bakery in Berkeley. Appellant requested a cookie. Gentry put a cookie in a bag and told appellant it was $1.15. Appellant then handed Gentry a note with writing on it. As she scanned the note, Gentry saw the words "[t]his is a robbery." At that point, Gentry looked at appellant and he lifted up his shirt. Gentry saw a handle, either the barrel of a gun or some sort of wooden handle, in the waistband of appellant's pants. Appellant told Gentry to hurry up and put the money in the bag with the cookie. After Gentry put the money in the bag, appellant told her to go to the back of the store, and he left.

Gentry identified appellant in court as the robber. However, after viewing the November 1, 2000, lineup, Gentry marked her lineup card with a question mark on position "number four" (appellant's position) because she was not absolutely sure of her identification. When asked why she used a question mark, Gentry replied: "Because at that point I had, when I saw the defendants come out, he was the one that really stood out for me, his voice, I believe he talked, his build, color of his skin, kind of his mannerisms. [¶] . . . When he was robbing me, I didn't really get a good look at his face because I was so, you know, frightened but I definitely remember the color of his skin, the way he moved, his voice for sure. So I wasn't really comfortable putting . . . something other than a question mark because I didn't absolutely know . . . without a doubt that this was the person who did this to me." Gentry identified People's Exhibit 7 as the shirt worn by the robber. On cross-examination, Gentry stated that when she was asked if she could identify anyone in the courtroom, she looked around the room and she selected appellant based upon the way he moved and carried himself and his skin tone. When asked how she could observe his mannerisms when he was sitting down, she replied, "[t]he same way I can tell anybody else's mannerisms when they're sitting down." Despite being across the counter from the robber and getting a good look at him, Gentry admitted she could not remember any facial features of the robber, but she identified appellant "based on mannerisms, voice, the color of his skin." When asked why she was not sure of her identification at the lineup

but she able to pick out appellant in court, Gentry replied: "At the lineup, what I pretty much tried to explain was that based on your mannerisms, the way you talked, . . . that was the person I picked out. Based on that right now, that's the person I would still pick out. But because it had been such a long time . . . since it had happened, I wasn't really comfortable saying for absolute sure that this was the person who did this to me unless I absolutely knew. [¶] . . . [¶] At this point coming into court and seeing the defendant, I can still say that this is the person who I believe did this to me based on mannerisms, color of your skin, and your voice." In response to a question from a juror asking how she could identify appellant before he had spoken or moved in court, Gentry explained she had identified appellant "[b]ased on the way he carried himself and I'd say the color of his skin really." She conceded she knew "many" people with the same skin color as appellant.

Sergeant Roger Short of the Oakland Police Department testified that appellant's responses to whether he had robbed a bakery in Berkeley and returned to Berkeley more than once, and his admission that he had a wooden stick in his waistband during an incident, corresponded to this robbery of the Toot Sweets Bakery.

D. October 12, 2000—Carjacking at Kaiser Hospital Parking Garage in Oakland; Second Robbery at Toot Sweets Bakery in Berkeley; and Attempted Robbery and Robbery at Neldam's Bakery in Oakland (Counts 6, 7, 8, 9)

At about noon on October 12, 2000, Holly Warren-Mordecai parked her car in the Kaiser Hospital parking garage in Oakland. The car was a 1999, blue metallic Volkswagen New Beetle. As Warren-Mordecai was getting out of the car, appellant told her to get back into the car and asked for all her money. When she showed him she had only change in her wallet, appellant asked for her car. Appellant put one of his hands around her neck and said, "[d]o you want me to hurt you? Don't make me shoot you." Appellant's other hand was in his pocket, and Warren-Mordecai did not know if he had a gun. Appellant asked Warren-Mordecai to write down her telephone number because he was taking the car and he would call her later to tell her where she could get the car. At appellant's demand, Warren-Mordecai put the keys in the ignition, and appellant pulled her

out of the car. Later that evening, Warren-Mordecai found a message from appellant on her answering machine, telling her the car was in a parking lot in Emeryville.

At the November 1, 2000, lineup and in court, Warren-Mordecai positively identified appellant as the carjacker. Additionally, Warren-Mordecai identified People's Exhibit 7 as the shirt worn by the carjacker. On cross-examination, Warren-Mordecai testified she would have recognized appellant if he had been walking down the street. The only differences in appellant's appearance from the carjacking to trial, were that in court, appellant's head was shaved and he had a little more of a beard.

After taking Warren-Mordecai's car, appellant returned to the previously robbed Toot Sweets bakery in Berkeley at about 12:30 p.m. Inside the store, he wrote a note and gave it to Kathleen Devlin. The note said, "[t]his is a robbery." Devlin gave appellant all the money she had in the register. Two other employees, Tod Wheeler and Patrick Daughton, followed appellant outside to the parking lot. Appellant approached a dark colored or blue Volkswagen New Beetle. After being shown photographs of Warren-Mordecai's car in court, Wheeler testified the car he saw was "very much the same" as Warren-Mordecai's car. Appellant told Daughton to get away from him or he would come back and shoot him.

Daughton positively identified appellant at the November 1, 2000, lineup and in court. Daughton, who is color blind, recognized People's Exhibit 7 as "extremely similar if not the actual shirt" worn by the robber.

Devlin positively identified appellant at the November 1, 2000, lineup and in court. Devlin also identified People's Exhibit 7, as the jacket worn by the robber. On cross-examination, Devlin stated even if there were more people sitting with appellant at the defense table, she could still identify appellant as the robber "without a doubt." When asked how she recognized appellant, Devlin stated: "Well, you just recognize somebody. You have the same lips, the same cheekbone structure. I didn't get a good look at your eyes, so, but facial hair is somewhat similar. I don't think you had a goatee at the time. Skin tone. General build." Even though the robber had worn sunglasses, Devlin could see "the shape of the nose, the shape of the lips, the skin color, cheekbones, general height,

how tall you were, how big you were." When appellant asked her how she could tell his height because he had not stood up that day in the courtroom, Devlin replied, "I can tell how wide your shoulders are and just generally, I mean, you fit within."

At the November 1, 2000, lineup, Wheeler marked his lineup card with a question mark because "[t]he robber on the day of the robbery was slightly disguised . . . . He was wearing dark glasses and a sort of knit cap . . . made of some type of jersey material which covered his hair and disguised his eyes . . . . That was enough of a doubt for me to not mark it with an X . . . . [¶] I was 95 percent sure . . . but not . . . a hundred percent sure so I put a question mark." When asked if he could identify the robber in court, Wheeler pointed to appellant and said, "I believe that's the man." When asked to describe his level of certainty and what was different or similar about appellant, Wheeler replied, "[h]is appearance has changed somewhat. [¶] . . . [¶] His hair was longer on the day I saw him there [at the lineup] which would reveal probably a very distinct hairline which is not evident today because his hair is so very short. This is one of the things that threw me on the . . . evening of the lineup was that I could have remembered a hairline like that, but having not seen it because it was under a cap, I was given some doubt." On cross-examination, Wheeler explained that he was completely sure the man he picked at the lineup was appellant and he was 95 percent sure at the lineup that appellant was the man who robbed the store. Wheeler did not recognize People's Exhibit 7 as the jacket worn by the robber; he did not remember the robber's "shirt one way or the other."

After robbing Toot Sweets Bakery, appellant went to Neldam's Bakery at about 2:20 p.m. There, he confronted the cashier, Linda Lucas, and told her he was going to rob her, and she should put all the money in a bag. Lucas did not comply but walked to the back of the bakery. Appellant jumped over the counter, and asked another cashier, Lynda Macias, to open the register. When Macias refused, appellant punched her on her shoulder, and Macias kicked appellant in his leg area, "probably by his foot." A third cashier, Carolyn Ann Leca, pulled Macias into the back room of the bakery. Appellant followed the two cashiers, and then walked through the kitchen and out the back door. A fourth employee, Mark Davis, followed appellant outside, and made a note of the license

plate of a late model Volkswagen Beetle in which appellant drove away. The license plate taken by Davis partially matched the license plate of Warren-Mordecai's car.

At the November 1, 2000, lineup, Leca positively identified appellant as the robber, and she also identified appellant in court. On cross-examination, Leca testified she could have picked appellant if he had been among a group of people because she could see a distinct brow line and she watched his face. Lucas identified appellant in court as the robber after looking throughout the courtroom. Lucas claimed she also identified appellant at a pretrial physical lineup. However, Sergeant Short testified the police reports did not show that Lucas attended any such lineup.

Macias did not identify appellant at the lineup (she picked out two different fillers) nor did she identify appellant in court. Davis was not present at the lineups and he did not identify appellant in court.

All four employees of Neldam's bakery identified People's Exhibit 7 as looking like the jacket worn by the robber.

Sergeant Short testified regarding appellant's admissions connecting him to the October 12th incidents at the Kaiser garage and Neldam's bakery, noting that appellant admitted he had left Warren-Mordecai's car in Emeryville. According to Sergeant Short, appellant's responses to whether he had robbed a bakery in Berkeley and returned to Berkeley more than once, connected him to the second robbery of the Toot Sweets Bakery.

E. October 13, 2000—Robbery at Kasper's Hot Dogs in Oakland (Count 11)

At about 6:30 p.m. on October 13, 2000, at Kasper's Hot Dogs store in Oakland, appellant handed a note to employee Shanna Barker. The note said, "[t]his is a robbery." Barker gave appellant the money from the register. Appellant then asked Barker for some food. While appellant was still in the store, a police officer and a priest came in to use the restrooms. After the officer and priest left, appellant waited a few minutes and then he left. Before he left, appellant asked for the robbery note back, and Barker gave it to him. Barker did not include in her statement to the police that the robber had asked for the note back.

Barker did not attend a pretrial physical lineup or view a photographic lineup. However, she identified appellant in court. On cross-examination, Barker indicated her attention was drawn to appellant "[b]ecause once someone does something, what you did to me, you never can forget their face." Upon being asked how she could identify him after seeing him only once two years earlier, Barker explained, " when something like that happen[s] to you that traumatic, you never forget [¶] . . . [¶] . . . I will never forget your face. That's the first time in my life I've been robbed and hopefully the last time, and I will never forget your face ever." When asked why she could not remember everything about him, Barker stated she was trying to remember as much as she could.

Sergeant Short testified appellant made admissions connecting him to the robbery at Kaspar's Hot Dogs.

F. October 17, 2000—Robberies at Round Table Pizza in Oakland (Counts 12, 13)

Appellant robbed two different Round Table pizza stores in Oakland on October 17th. At about 11:45 a.m., appellant entered one pizza store and gave a note to Natalie Wyatt, who was working behind the counter. According to Wyatt, the note said: "Be quiet. This is a robbery," and she thought it might also have said "[p]lease empty the cash register." The police recovered a note, which stated: "This is a robbery. Give me all the money and be quiet or I'll get violent." However, Wyatt was not sure that the recovered note was the actual note she have seen but it resembled the one she had been given by appellant. Wyatt gave appellant money from the register, and he left.

That evening, appellant entered another Round Table pizza store and showed a note to Sandy Moeung, who was working behind the counter. The top half of the note said, "[t]his is a robbery, be very quiet, hand me the money and I won't hurt you." When he left the store, appellant took the note. Moeung gave appellant money from one of the registers. After Moeung told appellant a second register was not working, he left.

Although neither Wyatt nor Moeung attended a pretrial physical lineup, the two pizza store robberies were recorded on separate store surveillance videotapes. In April 2001, Wyatt and Moeung separately viewed the videotapes and still frame photographs taken from the videotapes showing the respective robberies and robbers.

Wyatt identified appellant in the courtroom. On cross-examination, when she was asked what the robber was wearing, Wyatt conceded she could not really answer without looking at the still photograph, noting it had been two years. After looking at the still photograph of the robbery in court, Wyatt testified the depicted robber's facial structure resembled appellant's; the robber looked "very, very, very much like" appellant; and she was positive the robber was appellant. She could have identified appellant if he were in a group of people, "[i]f you were unshaved, most likely, yes." When she first saw him enter the courtroom, she knew appellant was the robber. Her memory was that good after two years because "[n]ot that you never forget faces like that, but things like that usually tend to stick in -- well, they stuck in my mind." Wyatt was sure appellant was the robber based upon "a mixture of both" looking at the robbery photograph and seeing appellant in the courtroom.

Moeung also identified appellant in the courtroom. On cross-examination, she explained that her ability to identify appellant in the courtroom had been refreshed by her viewing of the robbery videotape a year before the trial. When Moeung was asked whether she would remember him if she did not see him sitting by himself at the defense table, she replied: "Yeah. I've only been robbed once so I doubt I would forget the face." When asked why she could not recall what the robber was wearing, Moeung explained, "you can always change the way you look. You can change your clothes, you can shave your mustache or hair, but your facial features, I still remember those." When asked if a person could ever change their facial features, Moeung responded: "Unless you got surgery. Most likely I could have recognized you just from seeing you on the streets."

Sergeant Short identified appellant in the still frame photographs of the two pizza store robberies.

G. October 19, 2000—Carjacking in Oakland (Count 14)

At about 1:40 p.m. on October 19, 2000, Sharon Micklas stopped for gas at a station in Oakland. As she was pumping gas into her car, appellant got into the driver's seat. Micklas ran to the passenger side of the car, and got her mother out of the car. Micklas then struggled with appellant, hitting him with a camera. Appellant hit Micklas, and

pushed her out of the car; at the same time, appellant was going through Micklas's things, including her purse. Towards the end of her struggle with appellant, Micklas saw appellant reach inside his coat; she did not know if he had a gun. However, appellant never saw anything in appellant's hands while he was hitting her. Appellant grabbed the car keys from Micklas and drove away in the van. Micklas called 911 on her cell phone, and the police later stopped the van and detained appellant in handcuffs.

About a half hour after the carjacking, the police took Micklas to the arrest scene, where she identified appellant. According to Micklas, appellant said, "I'm sorry, Ma'am. I'm just a crackhead." Appellant also said, "[s]he's the one, she's the one." According to Officer Paula Petit of the Oakland Police Department, appellant said to Micklas: "Ma'am, Ma'am, I'm sorry I punched you and took your vehicle."

Micklas identified appellant in court as the carjacker. She also identified People's Exhibit 7 as the flannel jacket appellant had been wearing when he stole her car. On cross-examination, Micklas stated that even if appellant were not sitting by himself in court, she could have identified him by his voice, conceding his hair was "shaved now." Micklas further testified that during the carjacking, appellant was wearing a hat and sunglasses, a flannel jacket, and jeans. But at the arrest scene, appellant was not wearing his sunglasses, which he had left in Micklas's car. When asked how she could identify appellant in court as the person she saw at the time of the carjacking, Micklas replied that appellant was the only one in her car and nobody else would want to do that. Both Officer Petit and Sergeant Short recognized People's Exhibit 7 as the jacket appellant was wearing when he was arrested. Appellant also had a metal pipe in his pocket, which he later admitted using that day as a "simulate."

In his defense, appellant called his former counsel, Brian Bloom, who testified regarding his observations at the pretrial lineups. Appellant also called Gerald Whitmore, Ph.D., a clinical psychologist, who had met with appellant a number of times in 1998 and on six occasions between June and August 2000. During the sessions in 2000, Whitmore referred appellant to a chemical dependency recovery program. The doctor had no contact

with appellant after August 9, 2000, and no knowledge of appellant's mental state or his addiction between September 15 and November 16, 2000.

DISCUSSION

I. Admission of In-Court Identifications of Appellant

Appellant argues the in-court identifications by some of the witnesses were so impermissibly suggestive as to deny him his constitutional rights to due process and a fair trial because he was the only person sitting at the defense table. He further contends the prejudice was enhanced in this case because the prosecutor refreshed some of the witness's memories by asking them to identify their marked lineup cards or photographs of the videotaped robberies immediately before asking them if they could identify the perpetrator in the courtroom. We conclude appellant's claims have been waived by his failure to assert them at trial, and in any event, lack merit.

Appellant argues that as each eyewitness testified he objected to their in-court identification on that ground it was unduly suggestive because he was the only person sitting at the defense table. However, the record shows appellant did not object to any of the prosecutor's questions to the witnesses; he only objected after some of the witnesses pointed to him in the courtroom and the identifications were noted in the record.[2] Additionally, appellant did not raise any objection when the prosecutor asked certain

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[2] As to Devlin, Wheeler, Daughton, Warren-Mordecai, Leca, Lucas, Jatczak, Perez, Gentry, and Moeung, appellant merely said, "I object," when the prosecutor asked that the record reflect that the witness pointed to appellant. After Micklas's identification, appellant added to his objection, "I'm the only one sitting here. I shouldn't be hard to identify." Similarly, after Barker's identification, appellant added to his objection, "[o]nly one sitting here." Additionally, appellant did not object to the responses given by Macias, who first testified appellant "look[ed] like" the robber, but when asked if she were certain, she replied, "I'm not sure. It was so long ago." Nor did appellant object when Wyatt identified him in court. It was not until the conclusion of the prosecutor's case that appellant first asked the trial court to explain why the in-court identifications were admissible given that he was the only person sitting at the defense table. The court replied that in "all trials the defendant is basically the one sitting there. [¶] . . . [¶] . . . You could have had five people sitting up there with you if that's what you wanted. You just had to ask for it."

witnesses to identify their marked lineup cards or the still frame photos of the videotaped robberies before asking them if they could identify the perpetrator in court. At no time did appellant alert the trial court to the arguments he makes here by asking the trial court to strike or preclude the in-court identifications. Under these circumstances, we conclude appellant's contentions are not properly before us. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) "It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided." (*People v. Vera* (1997) 15 Cal.4th 269, 276.)

In any event, the singling out of appellant in the courtroom for "possible identification, without more, is not a process which requires reversal." (*United States v. Domina* (9th Cir. 1986) 784 F.2d 1361, 1370-1371; see *People v. Breckenridge* (1975) 52 Cal.App.3d 913, 936.) Relying upon isolated portions of witnesses' testimony, appellant argues that "[s]ome witnesses who were uncertain about identifying appellant before trial were suddenly able to do so in the courtroom, where appellant sat alone at the defense table. Others who had equal opportunity to view the robber did not identify appellant in court." However, that some of the witnesses expressed uncertainty of their identification before trial did not preclude them from making in-court identifications. (See *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1197.) Such a circumstance does "not amount to an impermissibly unfair one person showup. [Citation.]" (*Ibid*.) Rather, "an identification made in front of the jury carries with it the circumstances under which it was made, which, in turn, can be argued to and weighed by the jurors." (*People v. Breckenridge, supra,* 52 Cal.App.3d at p. 936; see *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1155.) Further, there is no "constitutional entitlement to . . . particular methods of lessening the suggestiveness of in-court identification[s] . . . . These are matters within the discretion of the court. [Citation.]" (*People v. Domina, supra,* 784 F.2d at p. 1369.) If appellant had been concerned about the witnesses seeing him sitting alone at the defense table, he could have timely requested other seating arrangements, which the trial court probably would

have granted.[3] (See *United States v. Matthews* (2d Cir. 1994) 20 F.3d 538, 547; *United States v. Robertson* (10th Cir. 1994) 19 F.3d 1318, 1323.)

Additionally, there is no merit to appellant's argument that "[t]he prosecution's use of the photographs and the line up cards to refresh the eyewitnesses' memories immediately [before] the in-court identification, in combination with the suggestive fact that appellant was the only person sitting at the defense table, was so unfair as to deprive him of federal due process."

There was nothing improper about the prosecutor asking witnesses to identify their marked lineup cards or the still frame prints of the videotaped robberies. The identifications by Jactzak and Perez of their marked lineup cards merely confirmed that the witnesses had earlier marked their lineup cards indicating the position of the alleged perpetrator at the lineup. Similarly, the still frame prints of the videotaped robberies identified by Wyatt and Moeung merely depicted the details of the robberies and the alleged perpetrator captured on the videotapes. The displays of the marked lineup cards and photographs in question were " 'no more than the equivalent of showing such witnesses a contemporaneously made written statement describing the facts, in order to refresh their recollection and make their testimony more accurate. The photograph[s] [and marked lineup cards] did not suggest possibilities, [they] showed facts.' [Citation.]" (*United States v. Stewart* (S.D.N.Y. 1991) 770 F. Supp. 872, 876.)

To the extent there was any suggestiveness caused by showing the marked lineup cards and the photographs of the videotaped robberies immediately before the witnesses were asked if they could identify the perpetrator in court, coupled with appellant's sole presence at the defense table, the circumstances do not rise to the level of unconstitutionally tainting the in-court identifications. (See *People v. Perkins* (1986) 184 Cal.App.3d 583, 590.) Relying upon isolated portions of the testimony of Jactzak and Wyatt, appellant argues that as a consequence of the prosecutor's procedure, "[s]ome of

[3] The trial court told appellant that he "could have had five people sitting" with him at the defense table. "[He] just had to ask for it." See footnote 2, *ante*.

the witnesses said that they recognized [him] from the pre-trial line up or from the photos, not from the robbery." However, the jury was aware of the weaknesses in the in-court identification testimony noted by appellant. The jury also had before it the photographs of the two physical lineups and the still frame prints of the videotaped robberies. By comparing appellant's physical appearance with the photographs of the lineups and the still frame prints of the videotaped robberies, the jury could evaluate the probative value of the witnesses' testimony, and if appropriate, disregard the identifications. Because the jury had all the necessary facts with which to weigh the reliability of the witnesses' in-court identifications, the prosecutor's procedure in eliciting those identifications did not deprive appellant of due process. (*People v. Dominick, supra*, 182 Cal.App.3d at p. 1196.)

II. Trial Court's Denial of Appellant's Request for Funds for An Expert Witness on Eyewitness Identification

Appellant contends the trial court abused its discretion in denying his request for funds to hire an expert witness on the issue of eyewitness identification. He claims the denial was prejudicial because his defense "centered on the accuracy of the eyewitness identification of him as the robber and several witnesses were of another race than appellant." We conclude the trial court's refusal of appellant's request does not warrant reversal.

On the day set for trial, appellant first raised the issue of receiving county funds for an expert witness before Judge Jon R. Rolefson. As to his need for an expert, appellant claimed four unspecified witnesses had identified him at a physical lineup, and two of the witnesses were not African American. Appellant had not yet contacted any experts and he was unable to give the court any information regarding the cost of their services. Judge Rolefson deferred the request to the trial judge, Joan S. Cartwright, noting appellant had not offered any valid justification for making the request on the day set for trial. Judge Rolefson also remarked that the trial judge would be in a better position to determine whether there was a need for an expert.

Appellant renewed his request for an expert on eyewitness identification before Judge Joan S. Cartwright. In his written motion papers, appellant merely cited several

statutory provisions and cases addressing the admissibility of expert testimony on eyewitness identification and indigent defendants' right to have experts appointed by the court.. At the hearing on his request, appellant argued it was a "proven fact" that some people of different ethnicities had trouble identifying people of other ethnicities. The prosecutor opposed appellant's request on the ground that at least five unnamed witnesses were apparently of the same race as appellant so that appellant's factual assertion regarding cross-racial identifications would not apply to about half of the counts. The prosecutor also argued that except for four counts, the eyewitness testimony was corroborated by appellant's admissions connecting him to the crimes. As to the four counts not supported by appellant's admissions, the prosecutor argued the People would submit other corroborating evidence placing appellant at the crime scenes. The trial court denied the request for funds, stating that the People's case was not based solely upon eyewitness identification evidence, and appellant had not demonstrated that cross-examination of the witnesses would be insufficient to challenge the identifications.

" '[T]here can be no question that equal protection demands that *in a proper factual situation* a court must appoint an expert that is needed to assist an indigent defendant in his defense.' [Citation.]" (*People v. Hurley* (1979) 95 Cal.App.3d 895, 898-899 (*Hurley*).) "Evidence Code section 730 authorizes the trial court to appoint an expert to render advice and to testify as a witness, and Evidence Code section 731 and Government Code section 29603 state that the county must pay for those court-ordered expenses. [Citations.] . . . [¶] However, it is only *necessary* services to which the indigent defendant is entitled and the burden is on the defendant to show that the expert's services are necessary to his defense. [Citations.]" (*People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1303-1304, fn. omitted (*Gaglione*), disapproved on another ground in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) "The decision on the need for the appointment of an expert lies within the discretion of the trial court and the trial court's decision will not be set aside absent an abuse of that discretion. [Citations.]" (*Gaglione, supra,* 26 Cal.App.4th at p. 1304.) We conclude there was no abuse of discretion in this case.

In denying appellant's request, the trial court appropriately considered that there were no counts in the indictment that depended solely upon eyewitness identification, and that the testimony of the eyewitnesses could be adequately attacked by cross-examination. (*Hurley, supra*, 95 Cal.App.3d at p. 899; see *People v. McDonald* (1984) 37 Cal.3d 351, 363, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) The prosecutor set forth the corroborating testimony she intended to offer at trial for each of the counts. At no time did the prosecutor acknowledge or appellant establish the People were relying solely upon eyewitness identification to support any count. Further, at the time of the motion, appellant did not give any reason why cross-examination of the witnesses would be inadequate in this case. Appellant extensively cross-examined the witnesses regarding their ability to observe, describe and recall the incidents and the perpetrator, the uncertainty of their identifications, their failure to make earlier positive identifications, and their failure to include certain information in their previous statements to the police and testimony before the grand jury. During his closing argument, appellant repeatedly stressed the unreliability of the identifications, particularly noting that he was the only one at the defense table, some witnesses who were uncertain about identifying him before trial were able to identify him at trial, and although all of the witnesses to the same event had the same opportunity to see him, some of the witnesses were not able to identify him in court. The trial court instructions using CALJIC No. 2.91 and the factors in CALJIC No. 2.92,[4] which included consideration of cross-racial identifications, " 'sufficiently focused

[4] Using CALJIC No. 2.91, the trial court told the jury the prosecution had the burden of proving beyond a reasonable doubt that appellant was the person who committed the charged crimes, and circumstances surrounding the identification, and any other evidence in the case, may raise a reasonable doubt. The jury was also told that in determining the weight to be given eyewitness identification testimony, it should consider the believability of the eyewitness as well as other factors that bear upon the accuracy of the witness's identification, including, but not limited to, the following factors: (1) the opportunity of the witness to observe the alleged criminal act and the perpetrator of the crime; (2) the stress, if any, to which the witness was subjected at the time of the observation; (3) the witness's ability, following the observation, to provide a description of the perpetrator of the act; (4) the extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness; (5) the cross-racial or ethnic nature of the

the jury's attention on the People's burden of proof on the issue of identity,' " and "g[a]ve the jury a focal point for considering cross-examination and arguments as to the credibility and reliability of a given witness'[s] identification of [appellant]." (*Hurley, supra,* 95 Cal.App.3d at p. 901; see *People v. Palmer* (1984) 154 Cal.App.3d 79, 83.) Appellant made no showing that in the absence of expert testimony the factors relevant to the jury's evaluation of the identification testimony listed in CALJIC 2.92 "might have [been] imperfectly understood or . . . might have operated contrary to the jurors' intuitive beliefs." (*Gaglione, supra,* 26 Cal.App.4th at p. 1304; see *People v. McDonald, supra*, 37 Cal.3d at p. 363.) As conceded by appellant, where a trial court has "explicitly found the requested services were not reasonably necessary, we w[ill] not now second-guess that determination; . . . an appellant court will reverse such an order only when 'the circumstances shown compelled the [trial] court to exercise its discretion only in one way, namely, to grant the motion.' [Citation.]" (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 323.) On this record, we conclude the trial court could appropriately find "this was not 'a proper factual situation' requiring the appointment of an expert." (*Hurley, supra*, 95 Cal.App.3d at p. 900.)[5]

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identification; (6) the witness's capacity to make an identification; (7) evidence relating to the witness's ability to identify other alleged perpetrators of the criminal act; (8) whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup; (9) the period of time between the alleged criminal act and the witness's identification; (10) whether the witness had prior contacts with the alleged perpetrator; (11) the extent to which the witness is either certain or uncertain of the identification; (12) whether the witness's identification is in fact the product of his or her own recollection; and (13) any other evidence relating to the witness's ability to make an identification. (CALJIC No. 2.92.)

[5] We reject appellant's argument that because the trial court denied him funds for an expert, his defense was further compromised by the prosecutor's argument to the jury that appellant had the same subpoena power as the government. The challenged remark was made during the prosecutor's discussion concerning a discrepancy between Micklas's trial testimony and a statement made by Micklas's mother recorded in a police report. In arguing to the jurors they should consider only Micklas's trial testimony, the prosecutor told the jury: "All parties in a criminal proceeding have equal access to bringing in witnesses and evidence, to using the subpoena power of the court. So if there was

DISPOSITION

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.

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something really big that would get Mr. Brown off of this charge, you would have it. He could have brought in such witnesses in evidence." After the last quoted sentence, appellant interposed an objection, by merely saying, "I object," which was overruled by the court. The prosecutor then continued her argument by noting that the statement by Micklas's mother would not necessarily make such a difference. The prosecutor's remarks did not allude in any way to appellant's ability or failure to call an expert witness on eyewitness identification testimony. When read in context, the prosecutor's remarks were merely permissible comment on appellant's failure to call a specific, logical witness. (*People v. Vargas* (1973) 9 Cal.3d 470, 475.)